IN THE HIGH COURT OF JUDICATURE
AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1907 OF 2007
IN
SUMMARY SUIT NO.3523 OF 2001

Akshay Navneetlal Parikh ...Plaintiff
Vs.
Nilesh Gopalbhai @ Rajubhai Shah ...Defendant

Mr. Jayant Gaikwad i/b. Ajay Khandar & Co. for Plaintiff
Mr. Kishore Jain i/b. Rahul Karnik for Defendant

CORAM: SMT. ROSHAN DALVI, J.
DATED: 1ST AUGUST, 2007

P.C.

1. This Notice of Motion is taken out in May, 2007 for setting aside an Ex-parte Decree passed on 19th January, 2005 and for staying further proceedings thereunder.

2. The decree has been passed in the above Summary Suit. The Defendants entered appearance. Hence, the Summons for Judgment was taken out. The Defendants did not appear in the Summons of Judgment, hence the Summons for Judgment was made absolute for want of affidavit in reply

and the aforesaid Ex-parte decree came to be passed.

3. This Notice of Motion has been taken out after 2 years, 3 months and 5 days. There is no prayer for condonation of delay in taking it out. The delay is sought to be extended in support of the Chamber Summons on the premise that the Advocate neglected and defaulted in filing any affidavit or appearing in the Summons for Judgment. The entire matter was missed and the defence of the Defendants was not known to the Court.

4. The affidavit in support of the Notice of Motion shows the case of the Defendant on merits. It is contended that not he but his father was a sole proprietor of the firm which issued and signed the Promissory Note in the Suit.

5. After passing of the Decree an Insolvency Notice came to be taken out. The Insolvency Notice came to be made absolute on 26th April, 2006. The Insolvency Petition itself came to be made absolute on 20th February, 2007. Public Notice also has been given. It is at such a belated stage that this Notice of Motion is taken out. The execution of the cheque by the father of the Defendant is admitted. The only aspect which would have to be seen is whether the father

was the sole proprietor of the firm or the Defendant was also its partner. The liability of the Defendant can be considered only if the Ex-parte order is set aside and the Summons for Judgment is restored to file.

6. Under the circumstances in which this Notice of Motion is taken out, after the aforesaid gross delay and after the Insolvency proceedings have culminated as aforesaid no such order can be passed until atleast the entire principal amount is deposited in the Court. Hence the following order:-

O R D E R

(1) Upon the Defendants depositing in Court Rs.5,00,000/- which is the principal amount in this Suit within 4 weeks from today, the Ex-parte decree dated 19th January, 2005 shall be set aside. If the amount is not deposited the Notice of Motion shall stand dismissed and execution shall proceed.

(SMT. ROSHAN DALVI, J.)